IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO. 19 OF 2002

M/s.Silkaans. ...Petitioner.

Vs.

The Saraswat Co-operative Bank Ltd. ...Respondent.

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Mr.S. Jinsiwale, partner of Petitioner firm in person.
Mr. Y.R. Naik for Respondent No.1.

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CORAM : DR.D.Y.CHANDRACHUD, J.

October 29, 2004.

P.C.:

This petition is directed against an order passed by the President of the Co-operative Appellate Court, Mumbai, on 20th August 1999, in an appeal arising out of an award of the Co-operative Court in a dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960.

2. The petition has been filed by a partnership firm. The firm had banking transactions with Saraswat Co-operative Bank Ltd. over a period of 15 years and maintained a current account at the Worli Branch of the Bank. The firm purchased copper wire bars as raw material for its business and contributed 30% of the

price of each consignment. The remaining 70% was paid by the Bank. The copper wire bars were pledged with the Bank and were stored in a godown of the Bank. The firm would repay the contribution made by the Bank together with interest as and when the pledged goods were required for the purpose of business upon which the goods would be taken delivery of from the godown. In March 1982 a theft took place in the godown of the Bank and out of 23 copper wire bars that were pledged in custody, 22 came to be stolen. The firm was intimated by a letter dated 9th March 1982 and a complaint was lodged with the Byculla Police Station. 12 out of the 22 stolen bars were recovered. The Godown Keeper who was an agent of the Bank, received the bars back from the Police after the Criminal Court allowed his application for return of the stolen goods. Eventually, in 1986, the aforesaid 12 bars were restored to the Petitioner-firm

3. The Petitioner filed a dispute before the Co-operative Court in 1986. By an award dated 27th February 1998, the Co-operative Court allowed the claim of the Petitioner holding that the Bank was guilty of negligence. The Court ordered the Bank to pay to the Petitioner a sum of Rs.3,13,320/- together with compound

interest at the rate of 18% p.a. on the said amount with effect from 9th March 1982 till realisation. Of the aforesaid amount, the value of the stolen goods was Rs.35,442/-, whereas the balance has been awarded as damages.

4. The matter was carried in appeal by the Bank. By his judgment and order dated 20th August 1999, the President of the Co-operative Appellate Court modified the decree of the Co-operative Court and directed the Bank to pay to the Petitioner a sum of Rs.35,442/- together with compound interest at the rate of 16% p.a. from the date of the theft with quarterly rests.

5. There is no dispute about the fact that in pursuance of the order of the Co-operative Appellate Court, an amount of Rs.7,29,030/- has been paid by the Bank on 19th June 2001.

6. The Appellate Court framed two issues which were as follows :

> "1. Did the bank prove that they took reasonable care of the pledged goods?

2. Did the Respondent prove turnover loss and to what extent?"

7. The Appellate Court held that the goods had been pledged with the Bank and were kept in a godown which were under the control of an agent of the Bank. The Court held that under Section 151 of the Contract Act, the Bank failed to take care of the goods as a person of ordinary prudence. The Bank did not lead any evidence. On behalf of the Petitioner, evidence was adduced of Mr. S. D. Jinsiwale, a partner of the Disputant-firm and of a Chartered Accountant whose evidence was adduced in support of the claim for damages. Having held that the Bank failed to establish that it had taken due care of the goods in accordance with its obligation under Section 151, the Appellate Court held that the Bank was liable to pay the price of the goods that were stolen together with interest. An award of Rs.35,442/- has been made together with compound interest with quarterly rests at the rate of 16% p.a.

8. On the question of damages, the claim of the Petitioner was that due to the non-availability of the stolen goods, the firm

had suffered a financial loss for the years 1982-83, 1983-84, 1984-85 and 1985-86. The Appellate Court was of the view that there was hardly any evidence on record to establish as to whether the firm really suffered any loss on account of the non-availability of the stolen goods until 1986. The Petitioner tried to place reliance on a certificate issued by the Chartered Accountant who was examined as a witness. However, neither the partner who deposed, nor the Chartered Accountant, explained how the firm suffered a loss due to the non-availability of the stolen goods. Though the Chartered Accountant mentioned a formula for calculating turnover loss, the basis of the formula was not explained in the course of the oral evidence. Moreover, the Appellate Court was of the view that the partner of the firm only made a vague statement in respect of the alleged loss of reputation and to a loss of orders from regular clients. No particulars of the lost orders were furnished. In these circumstances, the order of the Trial Court in regard to the award of damages has been vacated.

9. The Petitioner has been represented in these proceedings by its partner, Mr. S. D. Jinsiwale, who argued in person. The Petitioner in person submitted that the finding of the

Appellate Court on the award of damages has to be set aside. With the assistance of the Petitioner in person and Counsel appearing for the Bank, I have perused the evidence of the Petitioner, the Chartered Accountant and other material on the record. In the course of his evidence, the Petitioner sought to produce a certificate of the Chartered Accountant working out the turnover loss due to the loss of material pledged with the Bank. The Petitioner made a vague statement that he had suffered a loss of reputation with his customers since he could not deliver goods against certain orders. It was his claim that he should be compensated. The Appellate Court, in my view, is correct in its appreciation of the evidence of the Petitioner on the claim for damages. Damages have to be proved. In the present case, proof is totally absent. The Chartered Accountant gave a certificate at Exh.D-4 and sought to assert that the firm had suffered a consequential loss which according to him, was the turnover loss suffered by the firm. The evidence of the Chartered Accountant is purely hypothetical. He admitted in the course of cross-examination that the record on the basis of which the certificate had been issued, was not brought before the Court.

10. This is a case where there is a concurrent finding of both the Courts that the Bank was guilty of negligence in dealing with the pledged goods. The goods were under the custody of the Bank in a godown which was under the control of its agent. The Bank failed to discharge its obligation as a bailee. The Appellate Court awarded to the Petitioner the price of the goods which were lost together with compound interest at 16% p.a. That amount has been paid to the Petitioner. In a matter such as the present, the difficulty in the path of the Petitioner lies in a virtual absence of any credible evidence with regard to the loss which has been sustained. Indeed, the Chartered Accountant himself has stated in the course of his examination-in-chief that such a loss is in the nature of an intangible loss because the activities of the business are disrupted. An award of damages, however, cannot be based on conjecture in the absence of credible and sustainable proof.

11. The Petitioner in person is a senior citizen. When this matter came up for hearing on the last occasion, he stated that he does not wish to continue the long drawn litigation any further and would seek a finality to the dispute. I had suggested to the parties that it would be desirable in the interests of justice that the dispute

is settled. Today when the matter came up for hearing, Counsel appearing for Bank submitted a computation showing that even if the entire amount that has been awarded by the Co-operative Court is allowed to the Petitioner together with simple interest at 9% p.a., the Petitioner would be entitled to a total amount of Rs.8,66,930/- and hence, to an amount of Rs.1,27,900/- in excess of what has already been paid to the Petitioner. During the course of hearing, Counsel appearing for the Respondent-Bank stated that though the Bank maintains that there is no merit in the claim for damages, the Bank is nevertheless willing to offer to the Petitioner a total amount of Rs.2,50,000/- by way of full and final settlement over and above the amount that has already been paid. The Petitioner is not willing to accept the aforesaid suggestion. However, since Counsel appearing for the Bank has stated that the Bank would be willing to pay the aforesaid amount irrespective of the disposal of the petition, should the Petitioner be ready and willing to accept the offer as a final settlement, the aforesaid statement is recorded.

12. In the circumstances for the reasons already set out, I do not find any reason to interfere with the award of the Co-operative

Appellate Court. The Petition is accordingly disposed of taking on record the statement which has been made by Counsel appearing for the Bank. There shall be no order as to costs.

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